19089-11-78

Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**Nos. 74-1619 and 74-1608**

THE FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Respondents.*

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Petitioners,*

v.

THE FEDERAL POWER COMMISSION, *Respondent.*

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
140 Broadway
New York, New York 10005
*Attorney for*
*Edison Electric Institute*

*Of Counsel:*
CHARLES P. SIFTON
JOHN A. RUDY
ERIC H. MOSS
LEBOEUF, LAMB, LEIBY & MACRAE
November 28, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## TABLE OF CONTENTS


Page

INTEREST OF THE AMICUS ..... 2

SUMMARY OF THE ARGUMENT ..... 18

ARGUMENT

The Court of Appeals improperly found jurisdiction in the FPC to consider evidence of employment discrimination without an initial showing of its effects on cost or adequacy of service ..... 19

CONCLUSION ..... 31


## TABLE OF AUTHORITIES

CASES:


*Alabama Electric Cooperative* v. *Securities and Exchange Commission*, 353 F.2d 905 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 968 (1966). ..... 24

*Brotherhood of Railroad Trainman* v. *Howard*, 343 U.S. 768 (1952). ..... 14

*Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962) ..... 30

*Calvert Cliffs Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971) 6

*Chemehuevi Tribe of Indians, et al* v. *Federal Power Commission*, 420 U.S. 395 (1975) ..... 19

*City of Lafayette* v. *Securities and Exchange Commission*, 454 F.2d 941 (1971), *aff'd sub nom. Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973) ..... 24

*Crowell* v. *Benson*, 285 U.S. 22 (1932) ..... 25

*DeFunis* v. *Odegaard*, 82 Wash.2d 11, *appeal dismissed*, 414 U.S. 1038 (1973) ..... 15

*Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975) ..... 30

*Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949) ..... 20

*Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929) ..... 26

*Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643 (1931) .....19, 24, 26, 29

Page

*Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972) ..... 6-7
*National Association for the Advancement of Colored People* v. *Federal Power Commission*, 520 F.2d 432 (D.C. Cir. 1975) .....2, 4, 5, 11, 14, 15, 20, 21, 28
*New York* v. *United States*, 331 U.S. 284 (1947) ..... 26
*New York Central Securities Co.* v. *United States*, 287 U.S. 12 (1932) ..... 24
*Ng Fung Ho* v. *White*, 259 U.S. 276 (1922) ..... 26
*Universal Interpretative Shuttle Corp.* v. *Washington Metro. Area Trans. Comm.*, 393 U.S. 186 (1968) .. 30

FEDERAL STATUTORY PROVISIONS:

Administrative Procedure Act, § 7(d), 5 U.S.C. § 556 (d) ..... 25

Equal Employment Opportunity Act (Title VII, Civil Rights Act of 1964)
42 U.S.C. § 2000e ..... 2, 20
42 U.S.C. § 2000e-4(g)(1) ..... 20
42 U.S.C. § 2000e-14 ..... 2, 30

Equal Pay Act
29 U.S.C. § 206(d) ..... 2

Federal Paperwork Commission
P.L. 93-556, 88 Stat. 1789 (1974) ..... 7

Federal Power Act
16 U.S.C. § 791 *et seq.* ..... 20
16 U.S.C. § 797e ..... 3, 21
16 U.S.C. § 799 ..... 3
16 U.S.C. § 800a ..... 22
16 U.S.C. § 800b ..... 3
16 U.S.C. § 800c ..... 3
16 U.S.C. § 803a ..... 3
16 U.S.C. § 807 ..... 3
16 U.S.C. § 813 ..... 3
16 U.S.C. § 817 ..... 3
16 U.S.C. § 824 ..... 3
16 U.S.C. § 824(a) ..... 22

Page

16 U.S.C. § 824a ..... 3, 22
16 U.S.C. § 824b ..... 3, 23
16 U.S.C. § 824c ..... 3, 23

Natural Gas Act
15 U.S.C. § 717 *et seq.* ..... 20, 23
15 U.S.C. § 717a ..... 23
15 U.S.C. § 717b ..... 23
15 U.S.C. § 717f ..... 23

National Environmental Policy Act of 1969
42 U.S.C. § 4332 (A)-(H) (1970) ..... 3, 6

STATE STATUTORY PROVISIONS:

Alas. Stat. §§ 18.80.010-.300, § 23.10.192 (Supp. 1972) .. 2-3
Ariz. Rev. Stat. Ann. §§ 41-1401-1485 (1974) ..... 3
Cal. Labor Code Ann. §§ 1410-33 (1971) ..... 3
Colo. Rev. Stat. §§ 24-34-301-8 (1973) ..... 3
Conn. Gen. Stat. Ann. §§ 31-126-128 (1960) ..... 3
D.C. Police Regs. art. 47 (1965) ..... 3
Hawaii Rev. Stat. §§ 378-1-38 (1968) ..... 3
Ill. Rev. Stat. ch. 48, §§ 851-67 (1975) ..... 3
Ind. Stat. Ann. §§ 40-2312-2317 (Supp. 1975) ..... 3
Iowa Code Ann. § 601A.6 (1975) ..... 3
Kan. Gen. Stat. Ann. §§ 44-1001-1041 (Supp. 1974) ... 3
Ky. Rev. Stat. ch. 344 (Supp. 1974) ..... 3
Md. Ann. Code art. 49B, §§ 1-30 (Supp. 1975) ..... 3
Mass. Gen. Laws Ann. ch. 151B (1971) ..... 3
Mich. Comp. L. Ann. §§ 423.301-7 (Supp. 1975) ..... 3
Minn. Stat. Ann. §§ 363.01-.13 (1966) ..... 3
Mo. Stat. Ann. §§ 296.010-070 (Supp. 1974) ..... 3
Rev. Stat. Neb. §§ 48-1001-1009 (1972) ..... 3
N.H. Rev. Stat. Ann. §§ 354A-1-13 (Supp. 1974) ..... 3
N.J. Stat. Ann. 10:5-1-30 (Supp. 1974) ..... 3
N.M. Stat. Ann. §§ 4-33-13 (1974) ..... 3
N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1975) .. 3
N.Y. Civil Rights Law § 42, 45 (McKinney 1948) .... 29
Ohio Rev. Code Ann. §§ 4112.01-.99 (1973) ..... 3
Ore. Rev. Stat. §§ 659.010-.115 and § 659.990 (1973) ... 3
Pa. Stat. Ann. Tit. 43 §§ 951-63 (Purdon Supp. 1975) . 3
R.I. Gen. Laws §§ 28-5-1-39 (1974) ..... 3

Page

Utah Code Ann. § 34-35-1-35-8 (1974) ..... 3
Wash. Rev. Code §§ 49.60.010-.320 (Supp. 1974) .... 3
W. Va. Code § 5-11-15 (1966) ..... 3
Wis. Stat. Ann. §§ 111.31-37 (Supp. 1973) ..... 3
Wyo. Stat. Ann. § 27-257-264 (Supp. 1975) ..... 3

REGULATIONS:

28 C.F.R. § 1.7(b) (1975), (FPC, Rules of Practice and Procedure) ..... 25

Executive Order No. 11246, 30 Fed. Reg. 12319 (1965) 2

Executive Order No. 11375, 32 Fed. Reg. 14303 (1967) 2

LEGISLATIVE MATERIAL:

H.R. 93-1323, 93rd Cong., 2d Sess. (1974) ..... 7

S. Rept. 93-1323, 93rd Cong., 2d Sess. (1974) ..... 7

H.R. 92-238, 92nd Cong., 2d Sess. (1972) .....13, 18

Additional Views on H.R. 7152, No. 914 to Accompany H.R. 7152, 88th Cong., 2d Sess. (1964) ..... 12

S. Rept. No. 872 to Accompany S. 1732, 88th Cong., 2d Sess. (1964) ..... 12

Joint Committee on Atomic Energy, Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath, 92nd Cong., 1st Sess. (Joint Comm. Print 1972) ..... 6

*Hearings on Utility Fuel Adjustment Clauses Before the Sub. Comm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess. (1975) ..... 9

*Report on Electric Utility Fuel Adjustment Clauses, Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess. (Subcomm. Print 1975) ..... 9

Page

MISCELLANEOUS:

Atomic Energy Commission, 1972 Annual Report to Congress (1973) ..... 6

*The Budget of the United States Government, Fiscal Year 1976* (1975) ..... 7

*Electrical Week*

January 13, 1975 ..... 8
February 24, 1975 ..... 8
April 7, 1975 ..... 8
June 2, 1975 ..... 8
July 28, 1975 ..... 8

*Electrical World,* November 1, 1975 ..... 9

Federal Power Commission, 1974 Annual Report to Congress (1975) ..... 8, 9

Fogel, L. and Engerman, S., *Time on the Cross, the Economics of American Negro Slavery* (1974) ... 17

Samuelson, P., *Economics* (8th Ed. 1970) ..... 17

Smith, A., *The Wealth of Nations* (Mod. Lib. Ed. 1937) ..... 17

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

---

Nos. 74-1619 and 74-1608

---

THE FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Respondents.*

---

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Petitioners,*

v.

THE FEDERAL POWER COMMISSION, *Respondent.*

---

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

---

In accordance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for Petitioners and Respondents to file this

brief *amicus*. Copies of the consents have been filed with the Clerk of the Court.

## INTEREST OF THE AMICUS

Edison Electric Institute ("EEI") is the principal association of electric utility companies, having as its members 198 companies that supply electricity to 77.6% of all the electric service customers in the United States. EEI submits this brief in support of the position taken by the Federal Power Commission ("FPC" or "Commission") in its petition in this Court.

The decision below [1] judicially imposes on the FPC jurisdiction, which it does not possess by statute, to take into account in the performance of its regulatory functions, including licensing and rate review, evidence that an electric utility or other regulated company is a demonstrated discriminator in its employment relations. The Court of Appeals' decision requires that the FPC consider this evidence without a prior showing of the effect of the discrimination upon the cost or adequacy of the utility's services.[2] The addition of this sweeping and duplicative [3] jurisdiction to the ratemak-

---

[1] The Opinion of the Court of Appeals is reported at 520 F.2d 432 (D.C. Cir. 1975).

[2] *Id.* at 435, 443-44.

[3] The members of EEI are already subject to extensive Federal regulation with regard to equal employment practices under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-14 (Supp. July, 1972), the Equal Pay Act, 29 U.S.C. § 206(d) and Executive Orders Nos. 11246, 30 Fed. Reg. 12319 (1965) and 11375, 32 Fed. Reg. 14303 (1967). In addition to the Federal requirements, employment discrimination on grounds of race, color, religion and national origin is prohibited by the statutes of more than thirty states. Alas. Stat. §§ 18.80.010-.300, § 23.10.192 (Supp.

ing,[4] licensing,[5] environmental[6] and other tasks[7] already assigned by Congress to the agency is not only without basis in law but will, as a practical matter, have a crushing impact upon an industry already financially troubled, in significant part as a result of the regulatory delays to which it is already subjected. Moreover,

---

1972); Ariz. Rev. Stat. Ann. §§ 41-1401-1485 (1974); Cal. Labor Code Ann. §§ 1410-33 (1971); Colo. Rev. Stat. §§ 24-34-301-8 (1973); Conn. Gen. Stat. Ann. §§ 31-126-128 (1960); D.C. Police Regs. art. 47 (1965); Hawaii Rev. Stat. §§ 378-1-38 (1968); Ill. Rev. Stat. ch. 48, §§ 851-67 (1975); Ind. Stat. Ann. §§ 40-2312-2317 (Supp. 1975); Iowa Code Ann. § 601A.6 (1975); Kan. Gen. Stat. Ann. §§ 44-1001-1041 (Supp. 1974); Ky. Rev. Stat. ch. 344 (Supp. 1974); Md. Ann. Code art. 49B, §§ 1-30 (Supp. 1975); Mass. Gen. Laws Ann. ch. 151B (1971); Mich. Comp. L. Ann. §§ 423.301-7 (Supp. 1975); Minn. Stat. Ann. §§ 363.01-.13 (1966); Mo. Stat. Ann. §§ 296.010-070 (Supp. 1974); Rev. Stat. Neb. §§ 48-1001-1009 (1972); N.H. Rev. Stat. Ann. §§ 354A-1-13 (Supp. 1974); N.J. Stat. Ann. 10:5-1-30 (Supp. 1974); N.M. Stat. Ann. §§ 4-33-13 (1974); N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1975); Ohio Rev. Code Ann. §§ 4112.01-99 (1973); Ore. Rev. Stat. §§ 659.010-.115 and § 659.990 (1973); Pa. Stat. Ann. Tit. 43 §§ 951-63 (Purdon Supp. 1975); R.I. Gen. Laws §§ 28-5-1-39 (1974); Utah Code Ann. § 34-35-1-35-8 (1974); Wash. Rev. Code §§ 49.60.-010.320 (Supp. 1974); W. Va. Code § 5-11-15 (1966); Wis. Stat. Ann. §§ 111.31-37 (Supp. 1973); Wyo. Stat. Ann. § 27-257-264 (Supp. 1975).

[4] 16 U.S.C. §§ 813 and 824 (1970).

[5] *Id.* §§ 797e, 799 and 817.

[6] The National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (A)-(H) (1970).

[7] In addition to the basic ratemaking and licensing functions of the FPC, other regulatory functions in which, under the Court of Appeals' decision, evidence that the regulatee is a demonstrated discriminator in its employment relations will be admissible include interconnection proceedings, 16 U.S.C. § 824a (1970), approval of sales of assets, consolidations and mergers, *id.* § 824b, approval of securities issues, *id.* §§ 813 and 824c, and license renewal and modification proceedings, *id.* §§ 800b and c, 803a and 807.

the holding out of such broad jurisdiction to hear evidence of discrimination by an agency with concededly limited means of effecting its remedy will cruelly deceive injured victims of discrimination who may resort to the FPC for remedies which it is, as a statutory matter, unable to award.

It is first of all important to understand the sweeping scope of the Court of Appeals' finding of jurisdiction in the FPC and, secondly, the narrow and conjectural basis on which the finding of jurisdiction was made. Thereafter, this brief discusses the legal principles which require reversal of the Court of Appeals' decision.

**The Decision Below**

The basis for the Court of Appeals' decision appears in the following language from the Court's Opinion:

> "We can foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objectives. We therefore conclude that the Commission does have jurisdiction over employment discrimination in the narrower sense described at the outset of the discussion." 520 F.2d at 443-44.

The scope of the jurisdiction found by the Court of Appeals to exist in the FPC—the so-called "jurisdiction . . . in the narrower sense" referred to in the quotation above—is defined in the Court's Opinion as:

> ". . . the power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regu-

latee is a demonstrated discriminator in its employment relations." *Id.* at 435

The significance of this grant of jurisdiction, coupled with the Court of Appeals' remand to the FPC "for further proceedings consistent with this opinion," *id.* at 447, is best indicated by the complaint made concerning it by the FPC in its Petition for Certiorari in this Court. As the FPC has concluded, this finding of jurisdiction requires the FPC to "consider evidence of employment discrimination by their regulatees in the first instance without any initial demonstrable showing of cost impact or other impact on operations."[8] The finding of cost impact or other impact on operations has, in other words, already been made by the Court of Appeals on the narrow and conjectural basis hereinafter discussed. That finding having been made in this proceeding, the Court of Appeals has conferred jurisdiction on the FPC to consider evidence of employment discrimination, without further preliminaries, in every rulemaking, adjudicatory or other regulatory proceeding hereinafter engaged in by the agency with respect to the electric utility industry or its members.[9]

---

[8] Petition for Certiorari in Dkt No. 74-1619, at p. 7.

[9] To be sure, the Court of Appeals has left it to the discretion of the agency whether to proceed by general rulemaking as to the manner in which such evidence may be introduced or to consider such evidence when and as it is offered in case-by-case adjudicatory proceedings. 520 F.2d at 447n. 53. It has, however, mandated the consideration of such evidence in all the various proceedings, by rulemaking or otherwise, in which the FPC exercises jurisdiction over the electric utility industry and its members without further showing as to its relation to the cause under consideration.

**The Impact of the Decision Below on the Electric Utility Industry**

Thus viewed, it is apparent that the Court of Appeals' finding of jurisdiction in the FPC is as far reaching in its impact on the regulatory processes, not only of the FPC but of every regulatory body authorized to consider the cost and adequacy of service of an industry subject to its regulation, as that accomplished by Congress in enacting the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (A)-(H) (1970) ("NEPA").[10] (The difference, however, between the situation created by the enactment of NEPA and that created by the present case is that the Court of Appeals in the case at bar lacked a statutory basis equivalent to NEPA on which to base its decision.)

---

[10] The example of the consequences of the application of NEPA to the regulatory processes of the Atomic Energy Commission ("AEC") is instructive. In *Calvert Cliffs Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), the AEC was directed to revise its rules governing non-radiological environmental issues in the licensing of nuclear facilities to make them consistent with the requirements of NEPA. In its 1972 Annual Report to Congress, the AEC reported that no full-power operating license had been issued since January 1971 and no construction permit since March 1971. As stated by the AEC: "Principal among the factors converging to produce this situation were the broadened environmental protection responsibilities placed on the AEC by legislation, particularly the National Environmental Policy Act (NEPA) as interpreted in the *Calvert Cliffs* court decision of July 23, 1971." Atomic Energy Commission, 1972 Annual Report to Congress: Regulatory Activities, at 3-4 (1973). See Joint Committee on Atomic Energy, Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath, 92d Cong., 1st Sess. (Joint Comm. Print 1972).

With respect to the FPC, in one area of its jurisdiction alone, hydroelectric power regulation, the FPC's environmental evaluations required by NEPA and the decision in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir.

Quite plainly, if evidence of discrimination in employment becomes as integral a part of the regulatory process as environmental impact considerations have become as a result of the enactment of NEPA, this fact will have a major effect on an industry already financially troubled in significant part as a result of regulatory delays, and on an agency already severely overburdened with work.[11]

---

1972), is said by the FPC to constitute almost one-half of its actual and projected workloads:

WORKLOADS

| | 1974 actual | 1975 estimate | 1976 estimate |
|---|---|---|---|
| License applications | 615 | 620 | 614 |
| Environmental evaluations | 1,026 | 1,092 | 1,208 |
| Inspections | 854 | 1,000 | 1,050 |
| Power site land applications | 75 | 93 | 93 |

*The Budget of the United States Government Fiscal Year 1976* App., at 888 (1975).

[11] Companies engaged in the production of energy have been recognized by Congress as particular victims of the excessive paper work which results from duplicative regulation—a fact of particular significance in light of the Court of Appeals' almost casual decision that no harm will result from duplicative filings of EEO-1 forms with the FPC and with EEOC. 520 F.2d at 446-47. Thus, S.Rep. No. 93-1323 to accompany H.R. 93-1323 to establish a Commission on Federal Paper Work, which became P.L. 93-556, 88 Stat. 1789 (1974) quotes the Deputy Comptroller General in a communication to the Congress as follows:

> "Examples of data and information collection problems abound. For instance, during a study of data collection in the area we found that there is no central agency in Government responsible for directing or coordinating the collection of energy data, nor is there any agency whose principal responsibility is the analysis of energy data, as such. Yet, the magnitude and scope of energy data collection is enormous. As of March 1973, 15 major Federal agencies were circulating 145 energy-related questionnaires to the States and the private sector. These questionnaires require 11 million responses." 1974 U.S. Code Cong. & Admin. News, Vol. 3, p. 6663.

As noted by the FPC in its most recent annual report, the financial health of the electric utility industry is "the greatest power problem confronting the industry and the Nation."[12] The two principal causes of the problem, the FPC found, were inflation and delays in obtaining regulatory approvals for rate increases.[13] Moreover, the FPC noted that financial problems were especially dominant in the privately owned sector of the industry, and these problems "were reflected in declining profits, inability to secure adequate financing, deferral of new construction and acceptance of lower reserve margins and in some cases, appeals for State aid."[14]

As a result of its financial problems, the electric utility industry has severely contracted its construction program.[15] A survey by National Economics Research Associates found that in 1974 construction cutbacks for financial reasons resulted in utilities reducing their budgets by $21 billion through 1979.[16] Additional construction cutbacks have been made during 1975.[17]

These financial problems have been compounded by the inability of electric utilities to obtain timely in-

---

[12] Federal Power Commission, 1974 Annual Report, pt. 1 at p. 9. H.R. Doc. 94-3, 94th Cong., 1st Sess. (1975) ("FPC Annual Report").

[13] *Id.* at 11.

[14] *Id.* at 10-11.

[15] "The electric power industry spends more money each year for construction of new facilities than any other industry." *Id.* at 16.

[16] *Electrical Week*, Jan. 13, 1975, at 5.

[17] See, *e.g.*, *id.* Feb. 24, at 7; April 7, at 8; June 2, at 6; and July 28, 1975, at 6.

creases in their rates to offset increases in their cost of service. This condition is due, in part, to the inability of the FPC and other regulatory commissions to keep up with their workloads.[18] As a result, electric utilities are experiencing ever-widening periods of "regulatory lag" in their ratemaking, licensing and other proceedings before regulatory commissions.[19] Although no formal study of regulatory lag or delay in rate cases appears to have been made,[20] it has been recognized that the most complete data currently available has been compiled by the Edison Electric Institute.[21]

EEI's data is based on reports filed with it by investor-owned electric utilities on the rate proceedings completed in each calendar quarter. EEI has collected this data for the years beginning with 1971. Based on the data received, EEI has determined that the average time lag between the initial filing of an application and the issuance of a final order expe-

---

[18] *E.g.*, at the beginning of the FPC's 1974 fiscal year, "704 wholesale electric rate schedules were pending. An additional 2,777 were submitted during the year and the FPC acted on 2,619, leaving 862 pending at the end of June 1974." FPC Annual Report, at 20.

[19] A recent survey of utility professionals disclosed that unreasonable regulatory lag in rates, construction and obtaining permits, is considered by them as one of the most significant problems confronting the industry today. *Electrical World,* Nov. 1, 1975, at 32.

[20] *Hearings on Utility Fuel Adjustment Clauses Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess., ser. 94-19, at 18 (1975).

[21] Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., Report on Electric Utility Automatic Fuel Adjustment Clauses 27 (Subcomm. Print 1975).

rienced by reporting utilities in rate cases before the FPC and state commissions, respectively, is as follows:

| Date of Final Order | FPC | | State Commissions | |
|---|---|---|---|---|
| | Cases Reported | Lag * | Cases Reported | Lag * |
| 1971 | 3 | 10.2 months | 54 | 9.5 months |
| 1972 | 17 | 11.0 months | 83 | 10.0 months |
| 1973 | 12 | 9.1 months | 101 | 10.5 months |
| 1974 | 8 | 17.5 months | 156 | 10.5 months |
| Jan.-June 1975 | 5 | 24.4 months | 52 | 8.5 months |

* Average

Based on the data available, it would appear that the problem of regulatory lag has recently become significantly more acute in proceedings before the FPC.

Expansion of the FPC's jurisdiction to include issues relating to the employment practices of its regulatees cannot help but contribute further to the delay currently experienced in FPC regulatory proceedings. Any further increase in FPC regulatory lag will only exacerbate the problems confronting the electric utility industry.

### The Basis for the Decision Below

Against the broad impact of this far-reaching decision on the regulatory processes of the FPC and other agencies must be placed the narrow and conjectural basis on which the decision is founded. In brief, because the Court of Appeals can "foresee" isolated cases in which discrimination in employment "could be reasonably related" to consideration of the cost and adequacy of service by electric utilities, it has concluded that evidence of discrimination must be received as relevant and admissible in all proceedings

before the FPC.[22] What follows considers the basis for the Court of Appeals' conjectures and the conclusions which may properly be drawn from them.

It is, first of all, worthy of note that the record below contains neither allegation nor proof that discrimination by electric utilities has any effect at all upon the cost and adequacy of the service they provide. What Cross-petitioners sought from the FPC was an across-the-board rule prescribing personnel practices to be followed by utilities, the adjudication of complaints of employment discrimination, and the punishment of infractions of the rules promulgated by the agency. R. 40-47. The authority for this broad request was found by Cross-petitioners in the Fifth Amendment to the United States Constitution and in an expansive definition of the term "public interest" as that phrase appears in the FPC's organic statutes, to include numerous public policies unrelated to cost and adequacy of service supplied by the utilities. An examination of the record below reveals, however, no allegations or proof offered by Cross-petitioners concerning the impact of employment discrimination on those matters concededly within the FPC's jurisdiction, namely, cost and adequacy of service.[23]

In one section of their brief before the Court of Appeals, however, Cross-petitioners expanded their case to support the proposition that, in some instances, discrimination, besides being morally indefensible and

---

[22] 520 F.2d at 443-44.

[23] While Cross-petitioners sought reconsideration of the FPC's decision, their Petition for Reconsideration is similarly barren of allegations concerning the economic impact of discrimination. R. 86-92.

therefore within the expanded definition of public interest urged by them, is also undesirable because of alleged adverse economic consequences on the conduct of the regulated industry's business.[24] It was these suggestions in Cross-petitioners' brief before the Court of Appeals that were seized upon by that Court as a basis for the conclusion that evidence of employment discrimination is relevant and admissible in all FPC proceedings.

Even in the Court of Appeals, however, Cross-petitioners could offer no more in support of their proposition concerning the alleged adverse economic consequences of discrimination in employment than general statements concerning the "social costs" of discrimination.[25] But it is obviously a simple play on words to

---

[24] Petitioners' Brief in the Court of Appeals, at pp. 28-38.

[25] The statements concerning the cost effects of discrimination at pages 32 through 36 of the NAACP's brief before the Court of Appeals consist, on the one hand, of general statements concerning the "economic waste" of discrimination in a society, *e.g.*, Additional Views on H.R. 7152, House Report No. 914 to accompany H.R. 7152, 1964 U.S. Code Cong. Admin. News, Vol. 2, pp. 2487, 2515; Senate Report No. 872 to accompany S. 1732, 1964 Code Cong. Admin. News, Vol. 2, p. 2355. Such generalized "social costs" of discrimination are, of course, the responsibility of society at large to eliminate and cannot be taxed to the stockholders of public utilities alone by eliminating them from consideration in rate proceedings. On the other hand, the NAACP alluded, as did the Court of Appeals below, to certain isolated cases in which discrimination by specific regulated companies resulted in higher costs to those companies, *e.g.*, an increase in rates for long distance telephone service resulting from alleged employment discrimination against women in the Bell Telephone System. As discussed in the text of this brief, *infra*, these isolated instances in which discrimination in employment by a specific company in a specific labor market resulted in excess costs to that company cannot be expanded into a general proposition that discrimination in employment is in all instances and in all circumstances productive of excess costs to the

assert that, because discrimination in some hypothetical system of cost accounting applied to society at large produces undesirable waste, it therefore produces costs which should not be considered in determining the appropriate rate for electric service in a proceeding before the FPC.[26]

---

utility. Moreover, nothing in the position urged by the FPC and EEI on this Court would bar an interested party from litigating such instances of discrimination in employment before the FPC upon an initial showing that the practices were productive of excess costs.

[26] Even if it is within the FPC's jurisdiction to determine what *social* costs are to be passed on to consumers of electric power, it was certainly proper for the FPC to determine in this case that consumers of electric power, as a general proposition, should not be exempted from bearing a burden shared by the rest of society. Moreover, the FPC could properly determine as a jurisdictional matter that whatever benefits might accrue to society from requiring that all social costs of discrimination be borne by the investor owners of utilities are outweighed by the costs to society at large of injecting such issues into FPC proceedings. Thus, the social costs of having the FPC engage in such an effort would have to include those created by the waste of government resources involved in the duplication of effort by multiple agencies of government directed toward the same end and the diversion of the agency's resources from areas in which it has expertise to areas in which it has none. As Congress itself recognized in eliminating a conflict of jurisdiction between EEOC and the Department of Justice in the 1972 amendments to the Civil Rights Act of 1964:

> "Most importantly, persons charged with unfair employment practices should not be answerable to several Federal agencies pursuing separate policies. Multifarious remedies cause undue burden and harassment by a multiplicity of simultaneous or successive procedures. An example is the *Crown Zellerbach Corp* v. *U.S.*, [case 416 F.2d 980 (5th Cir. 1969)] where the union and employer after negotiating a compliance agreement with the Commission were nevertheless subjected to litigation in the Federal court. Next the Office of Federal Contract Compliance entered the picture. Ultimately the Department of Justice filed suit. Such duplication and overlapping proceedings are burdensome and harassing and should be avoided." H.R. 92-238, 1972 U.S. Code Cong. & Admin. News, Vol. 2, p. 2150.

The Court of Appeals in its Opinion attempted to convert these generalized statements of the "social costs" of discrimination into particular cases productive of particular costs which might be appropriate for consideration in a regulatory proceeding. However, the effort by the Court of Appeals was markedly unsuccessful for two reasons: first, because the specific hypothetical situations alluded to by the Court of Appeals as a basis for the general proposition that discrimination is never cost justified must under any realistic analysis be counterbalanced with examples to the contrary; and, secondly, because none of the hypotheticals suggested by the Court of Appeals can be expanded into the general proposition that discrimination always has an adverse impact on cost or adequacy of service. It is that adverse impact which would be necessary to sustain a general rule permitting the introduction of evidence of employment discrimination in all regulatory proceedings conducted by the FPC.

Thus, the Court of Appeals suggested the possibility that a practice of employment discrimination may lead to "strikes, demonstrations and boycotts" aimed at the utility, with a consequent increase in unproductive costs which should not be considered in rate proceedings.[27] However, realism compels recognition of the fact that in many communities obligating the utility to take the lead in eliminating discrimination may also result in "strikes, demonstrations and boycotts" against the utility with consequent unnecessary and unproductive costs. See, *e.g. Brotherhood of Railroad Trainman* v. *Howard*, 343 U.S. 768 (1952). The Court of Appeals' suggestion that all discrimination is economically harmful as a result of the "ex-

[27] 520 F.2d at 444.

cessive labor costs incurred because of the elimination from the prospective work force of those who are discriminated against" [28] must also be viewed in proper perspective. Against this suggestion must be juxtaposed the more realistic proposition that the individual utility must of necessity bear additional costs in order to integrate into its work force those who, on racial grounds or grounds of sex, have traditionally been excluded from the educational institutions in which the skills required by the jobs which the utility offers are acquired. Inefficiency and loss of morale, to which the Court of Appeals also alluded, 520 F.2d at 445, as resulting from discrimination, may also be a necessary consequence of efforts at integration. While these efforts are not to be condemned on the ground that they cannot be cost justified, they do indicate the lack of a basis for a general statement that discrimination necessarily results in excess costs.

Reference was also made by the Court of Appeals to the increased costs of litigation resulting from a policy of discrimination.[29] However, as the "reverse discrimination" case which came before this Court demonstrated, elimination of discrimination too has had its impact in additional litigation costs.[30] Finally, the Court of Appeals reasoned that, because a finding by the EEOC, OFCC or a court that a utility has engaged in employment discrimination may result in back pay awards, legal fees and loss of contracts, the FPC, therefore, has jurisdiction to consider whether a basis exists on which the government agency or a

---

[28] 520 F.2d at 445.

[29] *Id.* at 445.

[30] *DeFunis* v. *Odegaard*, 82 Wash. 2d 11, *appeal dismissed*, 414 U.S. 1038 (1973).

court would make such a determination. 520 F.2d at 445. Such reasoning must be rejected, if only because its logical extension would permit the FPC to investigate any matter which might lead to a damage award, loss of contract or expenditure of legal fees. Moreover, the argument must in addition be rejected because until a contract has actually been terminated or back pay and legal fees actually awarded, it is purely speculative and conjectural whether a company's employment practices will have such an effect on its costs. It cannot, in other words, be shown that an employment practice *will* have an effect on company costs simply because it *may* have that effect. Furthermore, even should an assessment be made of damage awards or back pay awards, or a contract terminated or legal fees expended, such sums only affect the company costs subject to FPC consideration if the company chooses to include those sums in its cost of service calculation. Thus, it cannot be said that an expense *will* have an effect on consumer rates simply because it *may* have that effect.

In all events, the general proposition on the basis of which the Court of Appeals found jurisdiction in the FPC—that it is in all cases in the economic self-interest of a utility to eliminate discrimination—will not withstand scrutiny as a factual matter. Indeed, it is dangerously simplistic. For one thing, it ignores the complexity of the problem of eliminating discrimination by suggesting that the "invisible hand" of economic self-interest will by and large correct a social evil which history has demonstrated cannot be dealt with so easily.[31] For another, it exaggerates the ease

[31] The proposition that morally desirable social results are, as a result of the intervention of an "invisible hand," produced by the

with which the social goals embodied in equal employment laws may be accomplished and suggests that they may be achieved as an incidental part of a regulatory process concerned with other social goals without the significant disruptions which EEI foresees will occur.[32]

The point is that while, of course, one may conjure up specific, limited factual circumstances in which pursuit of a policy of discrimination has had adverse economic consequences for a utility,[33] nothing which the Court of Appeals has summoned up can support the only proposition on which the broad finding of jurisdiction made by the Court of Appeals can be based: that discrimination is at all times and in all circumstances unjustifiable on economic grounds.

One further point with reference to the Court of Appeals' decision deserves mention. The FPC's plea, that an initial finding of cost or service impact must be alleged and shown as a jurisdictional fact before evidence of employment discrimination becomes admissible in regulatory proceedings, rings with peculiar poignancy in the light of the complaints of victims of discrimination that they are unable, with any speed or

---

pursuit of economic self-interest, Adam Smith, *The Wealth of Nations* 423 (Mod. Lib. Ed. 1937), and its corollary, that despised social institutions are of necessity without economic justification, are today questioned not only on a theoretical basis, P. Samuelson, *Economics*, pp. 39, 476-77, 782 (8th Ed. 1970), but also as a factual proposition. See, R. W. Fogel and S. L. Engerman, *Time on the Cross, the Economics of American Negro Slavery* (1974); Samuelson, *op. cit.* at 780 *et seq.*

[32] *Supra*, at pp. 6-10.

[33] Reversal of the Court of Appeals in this case would in no sense deprive the Cross-petitioners of the right to litigate such cases upon an initial showing of cost impact, when and as they arise in adjudicatory proceedings before the FPC.

conclusiveness, to obtain remedies from the multiple administrative and adjudicatory bodies ostensibly created to deal with discrimination.[34] The rule that jurisdiction is to be determined early in a proceeding not only serves the interest of the tribunal and of the adversary in not being burdened with complaints outside the competence of the tribunal to handle, it also serves the interest of the litigant in avoiding the frustration of discovering, after his complaint has been presented on the record, that the tribunal cannot rectify it. It would be the cruelest deception of victims of employment discrimination to permit them to put on the record before the FPC evidence of underutilization of their race by a utility only to find out that the FPC cannot do anything about it.

From every standpoint—that of the industry, of the agency and of the victims of discrimination—the decision of the Court of Appeals is unwise. What follows discusses the legal principles which show that decision to be without basis in law.

## SUMMARY OF ARGUMENT

The jurisdiction of the FPC to consider discriminatory employment practices by its regulatees is limited to those practices which have an adverse impact on the cost or adequacy of service. The Court of Appeals' determination that evidence of such practices is admissable in all FPC proceedings can only be based on a finding by the Court that such practices inevitably and in all cases result in higher costs and deterioration of service.

---

[34] See. H. Rep. 92-238, 1972 U.S. Code Cong. & Admin. News at pp. 2139-40.

Cross-petitioners did not offer evidence below to support such a finding and the Court of Appeals did not, and could not, make such a finding itself. Instead, the Court of Appeals' decision is based upon an extrapolation from isolated, hypothetical situations in which discrimination in employment may affect costs. Such limited, hypothetical situations are no substitute for proof of an essential jurisdictional fact. Therefore, the decision of the Court of Appeals must be reversed and the proceeding before the FPC dismissed.

## ARGUMENT

### The Court of Appeals Improperly Found Jurisdiction in the FPC to Consider Evidence of Employment Discrimination Without an Initial Showing of Its Effects on Cost or Adequacy of Service.

The Federal Power Commission can exert its powers in a jurisdiction neither broader nor narrower than that authorized by Congress. See, *Chemehuevi Tribe of Indians* v. *Federal Power Comm.*, 420 U.S. 395 (1975). Any authority which the Commission may have over the regulation of the employment practices of its regulatees must be found in a specific or necessarily implied statutory grant of power to act in that area. The judiciary may not grant any power to the Commission which Congress itself has not, by statute, delegated to it.

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by courts in the proper exercise of their judicial functions." *Federal Trade Comm.* v. *Raladam Co.*, 283 U.S. 643 at 649 (1931).

Both Cross-petitioners and the Court of Appeals recognize that neither the Federal Power Act (16 U.S.C. § 971 *et seq.*), the Natural Gas Act (15 U.S.C. § 717 *et seq.*) nor the Equal Employment Opportunity Act (42 U.S.C. § 2000-e *et seq.*) expressly grants to the Commission jurisdiction over the employment practices of its regulatees.[35] Nevertheless, the Court of Appeals has found that since, in some situations, a regulatees' discriminatory employment practices might affect either the cost or adequacy of a regulatee's service,[36] the Commission cannot decline to hear evidence of such discrimination in any of its rate making, licensing and other adjudicatory proceed-

---

[35] Unlike the enforcement provisions of NEPA, the Equal Employment Opportunity Act does not contain any direction for public enforcement, or even consideration of its policies, by any agency other than the EEOC. Any reference in this action to the example of NEPA enforcement by the numerous regulatory agencies is, therefore, inapposite except as a graphic demonstration of the stultifying effect which such enforcement has had upon the fulfillment of the express regulatory functions for which those agencies were created, see fn. 10 *supra*. Moreover, Congress, in enacting Title VII of the Civil Rights Act of 1964, clearly anticipated the possibility of overburdening Federal agencies with responsibilities outside their area of chief concern. Thus, in creating the EEOC, Congress granted it the power only "to cooperate with and, *with their consent*, utilize regional, State, local and other agencies . . ." (42 U.S.C. § 2000e-4(g)(1) [emphasis supplied]). Each agency other than the EEOC was left to determine in its own sound discretion and with due regard to its ability to properly execute its expressly delegated primary functions, whether it could and should effectively direct affirmative compliance programs under Title VII. The courts may not interfere with or direct the exercise of an agency's discretion. *Federal Communications Comm.* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949). Nor may the EEOC interfere with or direct the exercise of that discretion.

[36] 520 F.2d at 444.

ings.[37] The Court of Appeals' decision may only be read as an impermissible judicial extension of administrative power beyond the express limits of authority set forth in the acts of Congress under and within which the FPC must operate.

Each grant of authority by Congress to the FPC is expressly linked by statute to a preliminary finding by the Commission that the actions sought to be regulated will have an effect upon the cost or level of service to be provided by its regulatees.[38] Although

---

[37] The only substantive section of the Cross-petitioner's "Proposed Rule" expressly disapproved by the Court of Appeals as without the jurisdiction of the Commission was Section 9, which provides that:

> "Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section." (*Id.* at 446, 450).

The Court of Appeals found it to be within the Commission's jurisdiction to adopt "those sections [of the Proposed Rule] providing . . . for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), . . . " *Id.* at 446. Section 10 of the Proposed Rule provides for intervention in adjudicatory proceedings by "any person who believes himself or any specific class of individuals to be subjected to [employment] discrimination . . . ". Section 11 provides that the Commission shall give "material consideration" to information concerning a regulatee's employment practices and affirmative remedial actions with respect to employment discrimination. *Id.* at 450.

[38] Cross-petitioners' argument relies, *inter alia*, upon Section 4(e) of the Federal Power Act (16 U.S.C. § 297[e]) which grants the Commission power to issue licenses for certain improvements, provided that a specific finding be made that the improvements are:

> " . . . *desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for*

there are many areas in which the FPC is expressly enjoined to act in the "public interest" or for the "public convenience and necessity," it is not all con-

---

*the use or benefit of interstate or foreign commerce.*" [Emphasis supplied.]

Other sections of the Federal Power Act cited by Cross-petitioners to the lower court include § 7(a) (16 U.S.C. § 800[a]):

> "In issuing preliminary permits . . . or licenses . . . the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, *to conserve and utilize in the public interest the water resources of the region;* and, as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted *to develop, conserve, and utilize in the public interest the water resources of the region,* if it be satisfied as to the ability of the applicant to carry out such plans." [Emphasis supplied.];

§ 201(a) (16 U.S.C. § 824[a]):

> "It is declared that *the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,* and that *Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest,* such Federal regulation, however, to extend only to those matters, which are not subject to regulation by the States." [Emphasis supplied.];

§ 202 (16 U.S.C. § 824a):

> "*Whenever the Commission, . . . finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons* . . . During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a short-

ceivable public interests which the FPC is directed to pursue, but only those with which it is directly con-

---

age of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, . . . *to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest* . . . After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that *the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission.*" [Emphasis supplied.];

§ 203 (16 U.S.C. § 824b):

"The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate *to secure the maintenance of adequate service and coordination in the public interest* of facilities subject to the jurisdiction of the Commission." [Emphasis supplied.];

and § 204 (16 U.S.C. § 824c):

"No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order *only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service* . . . ."

Each provision of the Natural Gas Act (15 U.S.C. § 717 *et seq.*) relied upon by Cross-petitioners similarly relates the power of the Commission to the "public interest" in providing cost- and service-efficient energy where and when needed. See, 15 U.S.C. §§ 717a, 717b and 717f.

cerned. *New York Central Securities Co.* v. *United States,* 321 U.S. 67 (1944); *Alabama Electric Cooperative, Inc.* v. *SEC,* 353 F.2d 905 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 968 (1966); *City of Lafayette* v. *SEC,* 454 F.2d 941 (1971), *aff'd. sub nom. Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973). Under such circumstances it was not sufficient for the Court of Appeals simply to find that the elimination of discrimination was in the public interest. The Court had to go further to determine as a jurisdictional fact that the elimination of discrimination would serve that portion of the public interest which the FPC was intended to protect, namely, the public interest in the provision of cheap and adequate power. Cf. *Federal Trade Commission* v. *Raladam Co., supra,* 283 U.S. 643 (1931).

In *Raladam* this Court, although assuming that the respondent's patent medicine was harmful to human life, and that an injunction against its sale would be in the "public interest," nevertheless dismissed a complaint brought by the FTC since the FTC had been unable to find as a fact that respondent was in competition with others, so as to permit an investigation as to whether we had engaged in "unfair methods of competition." "Competition" was a necessary jurisdictional fact under the FTC's empowering legislation, and its existence was a prerequisite to the exercise of the FTC's authority, just as the existence of an adverse effect on cost or service is a prerequisite to the exercise of the FPC's authority in this case. However desirable it might appear at first blush to have all agencies of government pursuing all aspects of the public interest in whatever matters come before them, the considerations of public policy implicit in the concept of limited

jurisdiction required in *Raladam,* and require in this case dismissal of the proceeding in the absence of a preliminary jurisdictional showing.

The determination that discrimination in employment does, in fact, have an adverse effect on either the cost or adequacy of service is "fundamental or 'jurisdictional,' in the sense that [its] existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson,* 285 U.S. 22, 54 (1932). Moreover, Cross-petitioners, as proponents of the Proposed Rule, have the burden of proving all material facts,[39] including those facts on which are based the Commission's jurisdiction to consider their complaint.[40] The clear and unambiguous requirement of both the Federal Power Act and the Natural Gas Act is that an effect on a regulatee's cost or adequacy of service be found before Commission jurisdiction attaches. Yet in the Commission proceedings Cross-petitioners did not allude to, let alone sustain their burden of proving any such effect. No allegations of cost or service effectiveness were contained in either their initial petition to the Commission or their petition for rehearing.[41]

> "This, therefore, is not a case like *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 363, 371-372, where the Commission refused to receive

---

[39] Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d): "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[40] Federal Power Commission, Rules of Practice and Procedure, 18 C.F.R. § 1.7(b): "A petition for the issuance . . . of a rule by the Commission . . . shall set forth the purpose of, and the grounds requiring such rule . . . .".

[41] R. 1-53, 86-92.

> evidence proffered on the point of confiscation. Here, as we have said, the Commission received all evidence that was offered; and when its order was announced and made known and the petition for rehearing was filed, the opportunity to tender additional evidence to bolster the confiscation point was not accepted. As stated in *Manufacturers R. Co* v. *United States,* 246 U.S. 457, 489-490, and in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 53-54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo.* The reason is plain enough. These problems of transportation economics are complicated and involved." *New York v. United States,* 331 U.S. 284, 334-5 (1947).

In the absence of proof of the necessary jurisdictional fact of an adverse cost or service impact the Commission's power, like that of a court of limited jurisdiction, cannot, and has not been activated. See, *Federal Trade Comm.* v. *Raladam Co., supra,* 283 U.S. 643 (1931); *Federal Trade Comm.* v. *Klesner,* 280 U.S. 19 (1929); See also: *Ng Fung Ho* v. *White,* 259 U.S. 276 (1922).

Moreover, even were the Court of Appeals, in reviewing the order of the FPC herein, empowered to open the record and allow the untimely submission of Cross-petitioners' arguments, it is clear that they are unable to sustain the burden of proof placed upon them as proponents of the Proposed Rule. In ten pages of argument to the Court of Appeals devoted exclusively to the alleged economic impact of employment discrimination, the Cross-petitioners were able to state no

more than that employment discrimination, *in general, may have* adverse consequences on commerce, *in general.*[42] As noted above at pp. 12-17, neither Cross-petitioners nor the Court of Appeals were able to go beyond general statements concerning the social costs of discrimination and conjectural speculation concerning individual cases in which discrimination might affect rates and servces.[43]

---

[42] Among Cross-petitioners' statements to the Court of Appeals were:

> "The persistence of discrimination in employment in the natural gas and public utility industries *can* lead to serious disruptions in interstate commerce as a result of strikes, boycotts or demonstrations." (Cross-petitioner's Brief in the Court of Appeals, pp. 29-30)
>
> "The FPC cannot close its eyes to these conditions that *could* produce widespread dislocations in the industry it is charged with regulating and promoting." (*Id.* p. 31)
>
> "Speaking *generally*, a Congressional report noted: The failure of our society to extend job opportunities to the Negro is an economic waste . . . ". (*Id.* p. 32, quoting 1964 U.S. Code Cong. & Admin. News, Vol. 2, p. 2487)
>
> " 'Employment discrimination . . . *may* tend to inflate wages, limit the quality of work performance and result in preventing the employer from realizing an optimum return on labor cost expenditures.' " (*Id.* p. 33, quoting Statement of the United States Commissioner on Civil Rights, before the Civil Aeronautics Board, at 3-4 [September 25, 1972])
>
> "A further consequence of employment discrimination *may* be costly law suits and contract termination proceedings . . . Proceedings of this nature, especially *if* in the form of class actions, *could* result in enormous monetary judgments against gas and electric utilities, creating liabilities that *could* significantly affect the costs of companies and thus their rates." (*Id.* p. 35)
>
> [Emphasis supplied]

[43] The Court of Appeals' Opinion is even more explicitly conjectural than Cross-petitioners' brief below. Thus, the Court could state no more in support of the proposition that discrimination in

Mere speculation as to the possible consequences of an indeterminate act will not support an exercise of a limited jurisdiction. In *Federal Trade Commission* v. *Raladam Co., supra,* 283 U.S. 643 (1931) the FTC, although unable to supply evidence of actual use by

---

employment will always affect costs than the following, 520 F.2d at 443:

> "*We can foresee* situations in which consideration by the Commission of a regulatee's discriminatory employment practices including rules governing the invocation of that consideration, *could be* reasonably related to the pursuit of the Commission's proper objectives." [Emphasis supplied.]

The Court went on to state, 520 F.2d at 444:

> "The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those *arguably* within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, [footnote omitted] (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion." [Emphasis supplied.]

As noted, *supra,* at pp. 12-17, the specific and limited situations referred to by the Court of Appeals in the quotation above in no sense support a general proposition that discrimination in employment always adversely affects costs. Three of the situations —those in which discrimination results in strikes, loss of morale, inefficiency and excessive labor costs—obviously turn on particular and limited fact situations which are in no sense of universal application and can be offset by examples to the contrary. See pp.

the defendant of "unfair methods of competition," surmised that it must have been competing, and argued for the propriety of its assertion of jurisdiction. Despite the great public interest presumed to exist in the matter, this Court held that—

> "All this [the existence of competition] was left without proof and remains, at best a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission." 283 U.S. at 653.

Finally, consideration should be given to the effect of an affirmance of the decision below upon enforcement of the equal employment statutes. Congress has not exempted Commission regulatees from EEOC's jurisdiction. Over thirty states and other governmental subdivisions regulate employment discrimination (see fn. 3, *supra*).[44] The National Labor Relations Board may hear matters of racial discrimination insofar as they relate to the possible commission of unfair labor practices. See, *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975). Cross-petitioners now wish to add to this formidable

---

14-15, *supra*. The other three examples referred to by the Court of Appeals—involving loss of contracts, back pay awards and legal fees resulting from adverse determinations in litigation concerning discrimination in employment—are either of limited application, pertinent only in the case of those utilities against whom a back pay award, for example, has actually been made, or unfairly speculative, based on the unwarranted assumption that every utility subject to the FPC's jurisdiction will be found to have engaged in discriminatory employment practices.

[44] It is instructive to note that New York, for one, has specifically legislated in the area of employment discrimination by public utilities, and has assigned the task of regulation to the State Industrial Commission, *not* the Public Service Commission. N.Y. Civil Rights Law, §§ 42, 45 (McKinney, 1948).

array of regulation an agency whose aims, purposes and statutory directives are certainly not parallel, and may, at times, conflict with those of these other labor and social purpose agencies. It is entirely possible that the FPC, when faced with a problem in employment discrimination, in attempting to balance its actions in that sphere with its primary directive to assure cheap and adequate power, will trespass upon principles firmly established by other agencies. It may, indeed, become impossible for a regulatee to comply with the directives of both the Commission and EEOC. As this Court has said before:

> "We cannot ascribe to Congress a purpose of subjecting the concessionaire to these two separate masters, who show at the outset their inability to agree by their presence on the opposite sides of this law suit." *Universal Interpretative Shuttle Corp.* v. *Washington Metro. Area Trans. Comm.*, 393 U.S. 186, 191 (1968).

In the event of conflicting jurisdictions between two equal administrative bodies, this Court has always deferred to that agency more expert in the subject matter. See, *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962). To do otherwise would invited destruction of the Congress' carefully established scheme of distribution of administrative authority.[45] Due regard for that scheme requires this Court to find that it was never intended to place jurisdiction in the FPC to oversee the employment practices of its regulatees.

---

[45] Congress, in its 1972 review of Title VII, recognized the inherent difficulties created by overlapping jurisdiction in the equal employment area and established the Equal Employment Opportunities Coordinating Council (42 U.S.C. § 2000e-14). This Council, of which the Chairman of EEOC is a member, together with the Secretary of Labor, the Attorney General, the Chairman of the

## CONCLUSION

For the foregoing reasons, this Court should reverse that portion of the decision below construing the jurisdiction of the FPC to include regulatory responsibility over the employment practices of its regulatees and should affirm the dismissal by the FPC of the petition below.

Respectfully submitted,

CAMERON F. MACRAE
140 Broadway
New York, New York 10005

*Attorney for*
*Edison Electric Institute*

*Of Counsel:*

CHARLES P. SIFTON
JOHN A. RUDY
ERIC H. MOSS
LEBOEUF, LAMB, LEIBY & MACRAE

Dated: November 28, 1975

---

United States Civil Service Commission and the Chairman of the United States Civil Rights Commission, is responsible for:

> " . . . developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." *id.* [Emphasis supplied.]

Contrary to that specific direction, the Court of Appeals' decision *creates* conflict, competition, and duplication among the operations, functions and jurisdiction of the FPC and the EEOC, and threatens, in its implementation, to retard the enforcement of Title VII rights by propagating a mass of conflicting and inconsistent procedural and substantive rulings.